(1) Supreme Court, U.S.
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In the

Supreme Court of the United States

TRICIA LEROHL; SHELLEY HANSON,

Petitioners,

v.

FRIENDS OF MINNESOTA SINFONIA;
JAY FISHMAN,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should This Court Vacate The Opinion Of The Eighth Circuit And Remand For Further Proceedings Consistent With This Court's Recent Opinion In *Clackamas v. Gastroenterology Assoc., P.C. v. Wells?*

PARTIES TO THE PROCEEDINGS

Tricia Lerohl, Petitioner
Shelley Hanson, Petitioner

Other parties:

Friends of Minnesota Sinfonia d/b/a Minnesota Sinfonia; and
Jay Fishman, an individual and an employer

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OPINIONS BELOW

The Opinion of the Eighth Circuit is reported at 322 F.3d 486 (8th Cir. 2003) and is reproduced at App. 1a-12a. The Memorandum Opinions and Orders of the United States District Court for the District of Minnesota are reproduced at App. 12a-23a. Two apply to Hanson and one applies to Lerohl. The unreported decision of the Eighth Circuit denying the petition for rehearing is reproduced at App. 13a. The controlling opinion of the Supreme Court of the United States in the action entitled *Clackamas v. Gastroenterology Assoc., P.C. v. Wells*, is reported at __ U.S. __, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003) ("*Clackamas*").

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on March 5, 2003. A petition for rehearing and suggestion for rehearing *en banc* was denied by that court on May 22, 2003. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS

42 U.S.C. §2000e(f) (definition of "employee" in Title VII used in the Lerohl case)

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on

> the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. §12111(4) (definition of "employee" in ADA used in Hanson case)

> The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

STATEMENT

Lerohl and Hanson were both "regular" players in a local orchestra for over 10 years. Hanson played the clarinet and Lerohl played the french horn. The orchestra exercised control over the end product (musical performances). It controlled every detail concerning the manner and means by which this end product was produced. This included but was not limited to setting rehearsal start, break and end times, determining the precise points at which the musicians would play, selecting the music, instructing players what to wear and how to act, and when they did not act as the conductor wanted, disciplining and even firing them.

Hanson sued when orchestra conductor Jay Fishman ("Fishman") disclosed her sensitive medical data made confidential by the Americans with Disabilities Act ("ADA"), to the entire assembled orchestra during a full rehearsal. Lerohl was sexually harassed by Fishman. When she refused his advances he fired her.

Lerohl and Hanson brought separate lawsuits in the United States District Court for the District of Minnesota, alleging violations of the ADA and Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). Lerohl and Hanson each moved for partial summary judgment, asserting that Friends of Minnesota Sinfonia ("Sinfonia") was their employer, and if not the Sinfonia, then they were employed by individual defendant Fishman, the orchestra "leader."

In the Hanson case, defendant Sinfonia responded with a cross motion for summary judgment, arguing that Hanson was an independent contractor of the Sinfonia, and that as such, there was no jurisdiction for her federal claims. Defendant Fishman did not oppose Plaintiff's motion that he was an employer. In the Lerohl case, shortly after Plaintiff moved for partial summary judgment, both defendants moved for partial summary judgment. Defendants argued, *inter alia*, that Lerohl was an independent contractor of the Sinfonia.

The Hon. Franklin L. Noel, then-Chief Magistrate Judge for the District of Minnesota, issued a Report and Recommendation denying Hanson's motion for partial summary judgment and granting the cross motion for summary judgment of the Sinfonia, dismissed all federal claims with prejudice, and dismissed Hanson's state-law claims without prejudice. (App. 14a-26a). Hanson filed objections, and the Hon. James M. Rosenbaum approved

the Magistrate's Order. (App. 27a-28a). The Hon. Donald D. Alsop then issued an Order adopting the Order of Judge Rosenbaum on the employee issue in the Lerohl case, and stayed the state-law claims pending outcome of this appeal. (App. 29a-32a).

On appeal to the Eighth Circuit Court of Appeals, the cases were consolidated.

The United States Equal Employment Opportunity Commission ("EEOC") filed an *amicus curiae* brief, arguing, *inter alia*, that "control" is the primary factor to be considered when determining employment status under the federal civil rights statute.

Judge Loken wrote for the Eighth Circuit. His Opinion specifically rejected the EEOC's argument that control is the primary *Darden* factor, and disagreed with the EEOC's proffered definition of "control." On March 6, 2003, the Eighth Circuit affirmed the rulings of the District Court.

Lerohl and Hanson filed a petition for rehearing and suggestion for rehearing *en banc*. Once again, they were joined by the EEOC, which filed an *amicus* petition.

After filing the petitions for rehearing and suggestion for rehearing *en banc*, on April 22, 2003, this Court decided *Clackamas*. In *Clackamas*, this Court specifically adopted the EEOC's *amicus* argument that "control" is the primary *Darden* factor, and adopted the EEOC's definition of "control."

The Eighth Circuit denied Lerohl and Hanson's petition for rehearing and suggestion for rehearing *en banc* on May 22, 2003.

REASONS FOR GRANTING THE WRIT

1. Pursuant to *Clackamas v. Wells*, __ U.S. __, a decision entered *after* Hanson and Lerohl filed their Petition For Rehearing En Banc, this Court should Remand this Case to the United States Court of Appeals for the Eighth Circuit for Further Proceedings Consistent with *Clackamas*.

Clackamas specifically approved of and adopted the EEOC's position that "control" is the primary *Darden* factor when determining whether a plaintiff is an "employee" for purposes of federal civil rights claims. *Clackamas* affirmatively approved several arguments that had been emphatically rejected by the Eighth Circuit. The Lerohl and Hanson cases should be remanded to the Eighth Circuit for an opinion consistent with *Clackamas*.

A. *Clackamas* Specifically Decided That "Control" is the Primary *Darden* Factor.

In 1989 this Court held that in determining whether a plaintiff is an "employee," courts should apply the common law agency test. These are sometimes referred to as *Reid* factors, under *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 104 L.Ed.2d 811, 109 S. Ct. 2166 (1989). In 1992, this Court listed 12 factors to consider when determining employment status under statutes that provide little guidance as to the definition of "employee." *Nationwide Mutual Ins.*

Co. v. Darden, 503 U.S. 318, 323-24, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992). These are sometimes referred to as the *Darden* factors. Both the *Reid* and *Darden* decisions listed the "control" factor, that is, whether the hiring party "controlled" the worker. Until recently, however, this Court had not specifically held that "control" is the *primary Darden* factor. In *Clackamas*, this Court made clear that "control" is the *primary factor* to be considered when determining employment status.

B. The Eighth Circuit Emphatically Rejected the Argument that Control is the Primary *Darden* Factor.

Lerohl, Hanson and the EEOC all argued on appeal that "control" is the primary *Darden* factor to be considered in determining whether a plaintiff is an "employee." The Eighth Circuit expressly rejected this argument, stating,

> On appeal, Lerohl, Hanson, and the EEOC primarily argue that, in the EEOC's words, "it is critical that 'control' be given primary consideration." They then state the control issue in terms of individual Sinfonia concerts and conclude, not surprisingly, that Fishman as conductor "controlled" the rehearsals and concerts, and therefore all Sinfonia musicians are employees. We emphatically reject that approach. First, it is contrary to the Supreme Court's repeated admonition that no factor is determinative and all aspects of the parties' relationship must be considered. *See Darden*, 503 U.S. at 325-26, 112 S.Ct. 1344 (expressly

> rejecting a similar contention by the United States as amicus curiae); *Reid*, 490 U.S. at 750-51, 109 S.Ct. 2166.
>
> Thus, although one relevant factor was Fishman's undisputed control in selecting the music to be played, scheduling Sinfonia rehearsals and concerts, and determining the manner in which the concert music was collectively played, that factor is not determinative of the common-law agency issue.

Lerohl v. Sinfonia, 322 F.3d 486, 490 (8th Cir. 2003) (App. 6a).

The Eighth Circuit acknowledged that the Sinfonia had "control" over the musical performances of Lerohl and Hanson (322 F.3d at 492, App. 12a). But that Circuit went on to hold that, not only is "control" not the primary factor, when considered, it turns on whether a worker can reject the offer of work. At *Lerohl*, 322 F.3d at 490-91 (App. 10a), the Eighth Circuit held.

> [T]he musicians retained *control* over the extent to which they committed their available professional time to the Sinfonia." (Emphasis added).[1]

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[1] Lerohl, Hanson and the EEOC had all stressed that "regular" musicians had to accept the vast majority of the work. They could not come and go as they please, or reject much work at all. Of course, employees are also entitled to "decline" work if they, for example, schedule a vacation day or find a suitable replacement. This does not negate their employment status. Although employees are expected to attend the majority of scheduled shifts, this is no different from the case at bar, which required Lerohl and Hanson to play the vast majority of the preferred rehearsals and performances.

> Our cases applying the common-law agency test have recognized this freedom-of-choice principle in determining whether a skilled professional was an employee or an independent contractor in a particular case. In our view, this is the relevant control issue, not whether Fishman could tell Lerohl and Hanson where to sit and when to play during a concert or a rehearsal. Thus, the "key distinction" is whether Sinfonia musicians retained the discretion to decline particular Sinfonia concerts and play elsewhere.

This analysis, which emphasizes whether Lerohl and Hanson could decline work, is in direct conflict with *Clackamas* (*see* discussion below). In addition, this definition of "control" is inconsistent with the definition of "control" that the Eighth Circuit cites in its own Opinion (*Lerohl*, 322 F.3d at 489, App. 5a), and is inconsistent with *Clackamas*.

C. In *Clackamas* the Supreme Court Held that Control is the "Principal Guidepost" and the "Common-law Touchstone."

After Lerohl and Hanson had already filed their petition for rehearing and suggestion for rehearing *en banc*, this Court decided *Clackamas*. In *Clackamas*, this Court grappled with the definition of "employee" (*see* 123 S.Ct. at 1675) and specifically held that,

> The common-law element of control is the principal guidepost to be followed in

> deciding whether the four director-shareholder physicians in this case should be counted as "employees." Where, as here, a statute does not helpfully define the term "employee," this Court's cases construing similar language give guidance in how best to fill the statutory text's gap. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 323, 112 S.Ct. 1344, 117 L.Ed.2d 581.
>
> Accordingly, the Equal Employment Opportunity Commission (EEOC) argues that a court should examine whether shareholder-directors operate independently and manage the business or instead are subject to the firm's control. Specific EEOC guidelines discuss the broad question of who is an "employee" and the narrower one of when partners, officers, board of directors' members, and major shareholders qualify as employees. The Court is persuaded by the EEOC's focus on the common-law touchstone of control and specifically by its submission that each of six factors are relevant to the inquiry whether a shareholder-director is an employee. Pp. 1677-1681.
>
> The Court is persuaded by the EEOC's focus on the common-law touchstone of control....

Clackamas, 123 S.Ct. at 1675 (and 1680). This Court went on to state:

> We think that the common-law element of control is the principal guidepost that should be followed in this case. ... This is the position that is advocated by the Equal Employment Opportunity Commission (EEOC), the agency that has special enforcement responsibilities under the ADA and other federal statutes containing similar threshold issues for determining coverage.

Clackamas, 123 S.Ct. at1679.

> Specific EEOC guidelines discuss both the broad question of who is an "employee" and the narrower question of when partners, officers, members of boards of directors, and major shareholders qualify as employees. See 2 Equal Employment Opportunity Commission, Compliance Manual § § 605:0008-605:00010 (2000) (hereinafter EEOC Compliance Manual). With respect to the broad question, the guidelines list 16 factors–taken from *Darden*, 503 U.S., at 323-324, 112 S.Ct. 1344–that may be relevant to "whether the employer controls the means and manner of the worker's work performance." EEOC Compliance Manual § 605:0008, and n. 71.

Clackamas, 123 S.Ct. at 1679-80.

D. This Court Specifically Approved Application of the EEOC's Compliance Manualfor Determining whether Control Exists.

Clackamas held at 123 S.Ct. 1680, that

We are persuaded by the EEOC's focus on the common-law touchstone of control, see *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), and specifically by its submission that each of the following six factors is relevant to the inquiry whether a shareholder-director is an employee:

"Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work

"Whether and, if so, to what extent the organization supervises the individual's work

"Whether the individual reports to someone higher in the organization

"Whether and, if so, to what extent the individual is able to influence the organization

"Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts

> "Whether the individual shares in the profits, losses, and liabilities of the organization." EEOC Compliance Manual § 605:0009.

Although the Lerohl and Hanson cases do not turn on whether *shareholders* are "employees" under the federal civil rights acts (the fact scenario in *Clackamas*), the definition of "employee" – the analysis used to determine employee status – is at issue in both cases. Clackamas expressly approved of the EEOC's argument that "control" is the primary consideration in determining employment status. This holding calls into question the ruling of the Eighth Circuit on precisely that point. In addition, this Court's acknowledgement that the EEOC is the agency charged with enforcing these statutes, and that its Compliance Manual provides specific and relevant rules for defining "control" suggests that the Eighth Circuit would hold differently if it applied *Clackamas* to Lerohl and Hanson.

E. The Eighth Circuit's Decision is in Direct Conflict with the Recent *Clackamas* Rulings by this Court and should be Vacated.

The Eighth Circuit's holding in *Lerohl v. Sinfonia* – that "control" is no more or less important than any other factor, and that it is defined as whether the worker can reject the offer of work – is directly overruled by this Court's opinion in *Clackamas*.

The "control" factor is particularly important in the Lerohl and Hanson cases. District of Minnesota Judge Alsop noted that Lerohl's employment status

presented a "close question." (App. 31a). The Eighth Circuit has acknowledged that the Sinfonia controlled the musicians' performance, but de-emphasized the importance of that factor. If the "control" factor were applied consistent with *Clackamas*, it would tip the scales, and Lerohl and Hanson would be deemed "employees" entitled to the protection of the civil rights act.

Similarly, if the "economic realities" test was de-emphasized in application to Lerohl and Hanson, they would be deemed employees. Stated another way, the Eighth Circuit applied the "economic realities" test to Lerohl and Hanson's work. (*Lerohl*, 322 F.3d at 489, App. 6a). *Clackamas* did not apply the "economic realities test," but emphasized "control." This calls into question *Wilde v. County of Kandiyohi*, 15 F.3d 103, 104 (8th Cir.1994), cited with favor by the Eighth Circuit.

Finally, *Clackamas* confirms that "an employer may not evade the strictures of Title VII [or the ADA] simply by labeling its employees as 'partners.'" *Clackamas*, 123 S.Ct. at 1678. Applying *Clackamas*, the Sinfonia may not evade the strictures of Title VII or the ADA, simply by labeling its workers independent contractors.

CONCLUSION

In order to ensure that this Court's holding in *Clackamas* is effectuated and the correct law applied, Lerohl and Hanson request that this Court vacate the Eighth's Circuit decision in this case, and remand for proceedings consistent with *Clackamas*.

Respectfully submitted,

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(Any footnotes trail the end of each document)

No. 02-1433, No. 02-1443

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Tricia Lerohl; Shelley Hanson,
Plaintiffs - Appellants,

v.

Friends of Minnesota Sinfonia; Jay Fishman,
Defendants - Appellees.

Equal Employment Opportunity Commission, Amicus on Behalf of Appellants.

November 8, 2002, Submitted
March 6, 2003, Filed

COUNSEL: For TRICIA LEROHL, Plaintiff - Appellant (02-1433): Jill Clark, Golden Valley, MN. Stephanie Howard-Clark, Golden Valley, MN.

For FRIENDS OF MINNESOTA SINFONIA, JAY FISHMAN, Defendants - Appellees (02-1433): Frederick E. Finch, BASSFORD & LOCKHART, Minneapolis, MN.

For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Amicus on behalf of Appellant (02-1433, 02-1443): Susan R. Oxford, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, DC.

For Shelley Hanson, Plaintiff - Appellant (02-1443): Jill Clark, Golden Valley, MN. Stephanie Howard-Clark, Golden Valley, MN.

For FRIENDS OF MINNESOTA SINFONIA, JAY FISHMAN, Defendants - Appellees (02-1443): Frederick E. Finch, BASSFORD & LOCKHART, Minneapolis, MN. Kelly Ann Putney, BASSFORD & LOCKHART, Minneapolis, MN.

JUDGES: Before WOLLMAN, LAY, and LOKEN, Circuit Judges.

OPINIONBY: LOKEN

OPINION: LOKEN, Circuit Judge.

Musicians Tricia Lerohl and Shelley Hanson commenced these separate actions against the Friends of the Minnesota Sinfonia, a nonprofit corporation that governs the Minnesota Sinfonia. Lerohl and Hanson allege that they were terminated as regular members of the Sinfonia in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., respectively. In Ms. Hanson's case, ruling on cross-motions for summary judgment, the district court n1 dismissed her complaint, concluding that the ADA does not apply to this dispute because Hanson was an independent contractor, not an employee of either the Sinfonia or its conductor, defendant Jay Fishman. Hanson v. Friends of Minn. Sinfonia, 181 F. Supp. 2d 1003 (D. Minn. 2001). In Ms. Lerohl's case, again acting on cross-motions for summary judgment, the district court n2 dismissed the complaint, agreeing with the court's decision in Hanson and therefore concluding that Lerohl was an independent contractor outside the protection of Title VII. Lerohl and Hanson appealed, and we granted the Equal Employment Opportunity Commission leave to appear as amicus curiae on their behalf.

We review grants of summary judgment de novo. Mercer v. City of Cedar Rapids, 308 F.3d 840, 843 (8th Cir. 2002). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Because the ultimate issue of whether Lerohl and Hanson were employees or independent contractors is one of law, it may properly be resolved by summary judgment provided there is no genuine issue of material fact. See Birchem v. Knights of Columbus, 116 F.3d 310, 313 (8th Cir. 1997). Here, we conclude that any fact disputes are immaterial and that Lerohl and Hanson were independent contractors as a matter of law. Accordingly, we affirm.

I. Background.

The Sinfonia was formed in 1989 by Fishman and other former members of the Minneapolis Chamber Symphony Orchestra. Its mission is to perform free classical music concerts in inner-city public schools and other locations accessible to inner-city youth, families with young children, and people of limited means. In its first decade of operation, the Sinfonia grew from thirty-two to seventy concerts per year. Fishman conducts the Sinfonia and acts as its executive and artistic director. Sinfonia concerts are performed by twenty-five to thirty professional musicians. Fishman and all Sinfonia players are members of Local 30-73 of the American Federation of Musicians. The Sinfonia advertises that its musicians are "the best of the area's freelance pool."

After scheduling a series of Sinfonia concerts, Fishman prepares a list of musicians eligible to play for that series. The schedule is mailed to eligible "regular" or "first call" players who then advise the Sinfonia whether they agree to play that series. The Sinfonia's free-lance

musicians also perform for other organizations and as solo performers. They may even opt out of Sinfonia concerts they have agreed to play, so long as they give two weeks notice and arrange for an eligible substitute to perform. However, to remain a Sinfonia "regular," which ensures being invited to play in most if not all Sinfonia concerts, Fishman's policy is that a musician must "accept the vast majority of the work."

All Sinfonia players, and Fishman as conductor, are paid on a per-concert basis at the union scale. The Sinfonia does not withhold income or FICA taxes on these payments, instead documenting the payments for tax purposes on an IRS Form 1099. The Sinfonia does not provide musicians annual leave, health or life insurance, worker's compensation coverage, or other fringe benefits except that it does contribute an agreed percentage of the union scale payments to the musicians union pension fund. The parties dispute whether Fishman was required to agree to these contributions to remain in good standing as a union member. The Sinfonia also pays Fishman lump sums for his work as executive and artistic director. For tax and other purposes, he is treated as an employee with respect to these payments.

From 1990 to 1999, Lerohl and Hanson were "regular" players at Sinfonia concerts. Lerohl plays the French horn and Hanson plays the clarinet. In mid-1999, the Sinfonia stopped offering work to Lerohl and Hanson. Lerohl alleges the Sinfonia and Fishman violated Title VII by terminating her in retaliation for complaining about sexual harassment by Fishman. Hanson alleges defendants violated the ADA by ending her long-standing working relationship when she sought to resume playing after being absent several months while recovering from injuries sustained during a Sinfonia

rehearsal. Both statutes protect "employees" but not independent contractors. See Birchem, 116 F.3d at 312 (ADA); Wilde v. County of Kandiyohi, 15 F.3d 103, 104 (8th Cir. 1994) (Title VII).

II. The Relevant Legal Standard.

The issue whether a person is an employee or an independent contractor arises in many legal contexts. When the issue concerns the scope of a federal statute, we must first examine the relevant statutory language. In both Title VII and the ADA, Congress adopted a circular definition of "employee" – an employee is an "individual employed by an employer." See 42 U.S.C. §§ 2000e(f), 12111(4). In such cases, the Supreme Court applies the general common law of agency to determine whether a hired party is an employee or an independent contractor. See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-25 & n.3, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992) (ERISA), followed in Birchem, 116 F.3d at 312-13 (ADA), and in Wilde, 15 F.3d at 105-06 (Title VII). In applying this test, the Court has instructed us to consider a nonexhaustive list of factors derived primarily from the Restatement (Second) of Agency § 220(2) (1958):In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular

business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. . . . No one of these factors is determinative.Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-752, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989) (footnotes omitted). In weighing these factors, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." Darden, 503 U.S. at 324 (quotation omitted); see Hunt v. Missouri, 297 F.3d 735, 741 (8th Cir. 2002). The district court may properly consider economic aspects of the parties' relationship. See Wilde, 15 F.3d at 106. "Our inquiry . . . requires more than simply tallying factors on each side and selecting the winner on the basis of a point score." Schwieger v. Farm Bureau Ins. Co. of Neb., 207 F.3d 480, 487 (8th Cir. 2000).

On appeal, Lerohl, Hanson, and the EEOC primarily argue that, in the EEOC's words, "it is critical that 'control' be given primary consideration." They then state the control issue in terms of individual Sinfonia concerts and conclude, not surprisingly, that Fishman as conductor "controlled" the rehearsals and concerts, and therefore all Sinfonia musicians are employees. We emphatically reject that approach. First, it is contrary to the Supreme Court's repeated admonition that no factor is determinative and all aspects of the parties' relationship must be considered. See Darden, 503 U.S. at 325-26 (expressly rejecting a similar contention by the United States as amicus curiae); Reid, 490 U.S. at 750-51.

Second, on a more practical level, the notion that musicians are always employees when they perform in a conducted band or orchestra flies in the face of both common sense and undisputed facts in this record, such as plaintiff Hanson's affidavit reciting that she is not an employer when she hires musicians to play while she

records a musical composition. Work by independent contractors is often, if not typically, performed to the exacting specifications of the hiring party. In Reid, for example, the Supreme Court determined that a sculptor was an independent contractor for the purposes of the Copyright Act of 1976 even though the nonprofit association that hired him defined the scene to be sculpted and specified most of the details of the sculpture's appearance, including its scale and the materials to be used. 490 U.S. at 735-36, 752. Thus, although one relevant factor was Fishman's undisputed control in selecting the music to be played, scheduling Sinfonia rehearsals and concerts, and determining the manner in which the concert music was collectively played, that factor is not determinative of the common-law agency issue.

III. Prior Musician Case Law.

There are surprisingly few cases addressing whether musicians who played in a band or orchestra were employees of either the entity that engaged the performance, or the musicians' band leader or orchestra conductor. Hilton Int'l Co. v. NLRB, 690 F.2d 318 (2d Cir. 1982), a National Labor Relations Act case, held that the members of "steady engagement" bands were not employees of the casino hotels that engaged them. The decision confirms that the question is thorny, but it is not particularly relevant because the musicians were admittedly employees of someone (their independent band leaders), as were the musicians in Associated Musicians of Greater Newark, Local 16, 206 N.L.R.B. 581 (1973), aff'd per curiam, 512 F.2d 991 (D.C. Cir. 1975). Here, on the other hand, the issue is whether the musicians were free-lance independent contractors, or were employees of either Fishman, the orchestra conductor, or his employer, the Sinfonia.

A more relevant labor law case is Seattle Opera v. NLRB, 292 F.3d 757 (D.C. Cir. 2002), where a divided panel upheld the NLRB's determination that the Seattle Opera's auxiliary choristers were employees of the Opera. But the majority relied heavily on the deference due the NLRB's decision, consistent with NLRB v. Town & Country Elec., Inc. 516 U.S. 85, 94, 133 L. Ed. 2d 371, 116 S. Ct. 450 (1995). On the control theory urged by Lerohl, Hanson, and the EEOC, we find Judge Randolph's dissent more persuasive:The Board and the majority find it significant in determining whether the auxiliary choristers are employees rather than volunteers that the Opera "has the power or right to control and direct the person in the material details of how such work is to be performed." 292 F.3d at 762. This is outright silly. Are we to suppose that volunteer firefighters or volunteer rescue workers become "employees" because the fire chief or the head of the rescue squad directs them? . . . Auxiliary choristers join other singers to perform musical works. . . . Rehearsal cannot be done independently. Choir members need to know not only the notes and the words, but they must also blend their voices together into a single sound. 292 F.3d at 776-77. Judge Randolph's reasoning is consistent with the only reported case we have found that applied the common-law test to determine whether musicians were employees of their orchestra. In Florida Gulf Coast Symphony v. Dep't of Labor & Employment Sec., 386 So. 2d 259 (Fla. App. 1980), the symphony and its musicians, who were members of the American Federation of Musicians, entered into contracts providing that the musicians were independent contractors. The Florida Department of Labor and Employment Security nonetheless assessed the symphony for contributions to the state employee compensation fund. The court reversed the agency's order, disregarding the symphony's control over musician performances and

concluding the musicians were independent contractors because they -are engaged in a distinct occupation; are considered by petitioner to be independent contractors; spend more than two-thirds of their time in activities over which petitioner has no control whatsoever; are responsible for the manner in which the musical effects are achieved; supply their own instruments; receive the bulk of their income from sources other than petitioner; are paid on a per job basis, and are free to pursue other job opportunities in the music field at their discretion. 386 So. 2d at 264. These same facts are present in this case, except there were no written contracts between the Sinfonia and its musicians, and the record is silent as to how much of the musicians' time was spent playing elsewhere and how much of their total income was derived from sources other than the Sinfonia.

IV. Analysis.

Like the sculptor in Reid, Sinfonia musicians such as Lerohl and Hanson are highly skilled professionals who own their own instruments and need no on-the-job training other than rehearsals to perform in a variety of musical settings. Obviously, professional musicians have the option of becoming employees of a particular band or orchestra. The record in this case suggests that is true of the musicians who play for the Minnesota Orchestra, the St. Paul Chamber Orchestra, and the Minnesota Opera. But other musicians may prefer to remain "free-lance," committing themselves fully to no client and retaining the discretion to pick and choose among available engagements, much like lawyers, accountants, and business consultants who choose private practice instead of "in-house" employment.

Our cases applying the common-law agency test have recognized this freedom-of-choice principle in

determining whether a skilled professional was an employee or an independent contractor in a particular case. In our view, this is the relevant control issue, not whether Fishman could tell Lerohl and Hanson where to sit and when to play during a concert or a rehearsal. Thus, the "key distinction" is whether Sinfonia musicians retained the discretion to decline particular Sinfonia concerts and play elsewhere. Berger Transfer & Storage v. Cent. States, S.E. & S.W. Areas Pension Fund, 85 F.3d 1374, 1380 (8th Cir. 1996) (truck owner-operators who drove for more than one company were independent contractors); accord Kirk v. Harter, 188 F.3d 1005, 1008-09 (8th Cir. 1999) (computer programmer); Wilde, 15 F.3d at 106 ("self-employed business owner"); Florida Gulf Coast Symphony, 386 So. 2d at 264.

Here, it is undisputed that Lerohl, Hanson, and the other "regular" Sinfonia musicians retained the discretion to perform elsewhere and to accept or reject playing in a particular concert series. Indeed, they were permitted to back out of specific performances after agreeing to perform in a series if they arranged for suitable substitutes. Though the Sinfonia understandably offered inducements to preferred performers, such as "regular" status, the musicians retained control over the extent to which they committed their available professional time to the Sinfonia.

It is also highly significant that the Sinfonia withheld no income or FICA taxes, documented musician payments on an IRS Form 1099, and provided no employee benefits other than contributions to an independent union pension fund. "Every case since Reid that has applied the [common-law] test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes."

Kirk, 188 F.3d at 1008; see Birchem, 116 F.3d at 313. A recent exception is Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 118 (2d Cir. 2000), but Eisenberg is readily distinguishable because it involved an hourly full-time warehouse worker, not a consultant or free-lance professional. Here, the Sinfonia's professional musicians retained the discretion to perform elsewhere and accepted payments structured in a manner that confirmed their independent contractor status. In such a case, we are loath to destroy the parties' freedom to choose that form of relationship by deciding, after the fact, that they were required to contract as employer and employees, particularly when Congress remains free to extend Title VII and the ADA to this kind of independent contractor relationship if it determines that to be in the public interest.

Lerohl and Hanson and the EEOC further argue that the district courts erred because genuine issues of material fact preclude the grant of summary judgment on this record. We disagree. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). For the reasons previously explained, the undisputed facts in this case establish that Lerohl and Hanson were independent contractors as a matter of law, and the disputed facts, viewed most favorably to Lerohl and Hanson, do not affect that conclusion.

Finally, Lerohl and Hanson object that the district courts improperly dismissed Fishman as a separate defendant sua sponte, citing cases in which independent band leaders have been found to be employers. A trial court has the power "to enter summary judgments sua sponte, so long as the losing party was on notice that she had to

come forward with all of her evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Here, Fishman was not an independent orchestra conductor; he was an employee of the Sinfonia. If Lerohl and Hanson were employees of Fishman, they were employees of the Sinfonia. Thus, when the district courts concluded that Lerohl and Hanson were not employees, despite Fishman's control over their musical performances, that determination necessarily encompassed any separate claim against Fishman, whose relevant actions were taken on behalf of his employer. In these circumstances, the courts properly granted summary judgment in favor of Fishman as well as the Sinfonia.

The judgments of the district courts are affirmed.

FOOTNOTES

n1 The HONORABLE JAMES M. ROSENBAUM, Chief Judge of the United States District Court for the District of Minnesota, adopting the Report and Recommendation of the HONORABLE FRANKLIN L. NOEL, Chief Magistrate Judge of the United States District Court for the District of Minnesota.

n2 The HONORABLE DONALD D. ALSOP, United States District Judge for the District of Minnesota.

No. 02-1433, No. 02-1443

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Tricia Lerohl; Shelley Hanson,
Plaintiffs - Appellants,

v.

Friends of Minnesota Sinfonia; Jay Fishman,
Defendants - Appellees.

Equal Employment Opportunity Commission, Amicus on Behalf of Appellants.

May 22, 2003, Decided

OPINION: The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge McMillian would grant the petition for rehearing en banc.

May 22, 2003

Civil No. 00-1900 JMR/FLN

UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA

Shelley Hanson, Plaintiff,

v.

Friends of Minnesota Sinfonia and Jay Fishman, Defendants.

REPORT AND RECOMMENDATION

November 21, 2001 Filed

Jill Clark, Esq., for Plaintiff.
Kelly A. Putney, Esq., for Defendants.

THIS MATTER came for a hearing before the undersigned United States Magistrate Judge on Plaintiff's Motion for Partial Summary Judgment [#29]. This matter has been referred to the undersigned for a Report and Recommendation pursuant to 28 U.S.C. § 636 and Local Rule 72.1(c). For the reasons which follow, the Court recommends that Plaintiff's Motion be denied and Summary Judgment be entered in the Defendant's favor,

I. FACTUAL BACKGROUND

This dispute arises from the injury of Plaintiff Shelley Hanson ("Ms. Hanson") sustained after being struck by a light fixture during a rehearsal at the Minnesota Sinfonia Chamber Orchestra. ("Sinfonia") After taking time off to recover, Ms. Hanson returned to the Sinfonia only to discover that she was terminated from her position as a

clarinet player. (See Pl's Mem. Supp. Mot. Partial Summ. J. at 1) ("Pl.'s Supp Mem.").) Ms. Hanson filed suit alleging (1) Disability Discrimination, failure of accommodation, and Breach of Confidentiality under the Americans with Disabilities Act ("ADA"), the Minnesota Human Rights Act ("MHRA") (2) Negligent Infliction of Emotional Distress, (3) Invasion of Privacy, (4) Defamation, (5) Interference with Prospective Business Relations, (6) Breach of Contract; and (7) Promissory Estoppel. (See Compl. at 1.)

The Sinfonia provides chamber orchestra music to members of the public who might not ordinarily have access to such events. The Sinfonia's organizational structure consists of the Manager (also referred to as Managing Director) and the Artistic Director. (See Def.s' Mem. Supp. Mot. for Summ. J. and Opp. Pl.'s Mot. for Partial Summ. J. at 3-4 ("Def's Opp. Mem.").) The Manager performs all administrative tasks and the Artistic Director makes decisions regarding performers, venue and programming. The two aforementioned positions are considered employees of the Sinfonia, and as such, have payroll taxes withheld from their compensation, as well as workers compensation coverage. Defendant, Jay Fishman ("Fishman"), co-founder and Executive Director of the Sinfonia, also serves as the Artistic Director and Conductor. Sinfonia engages musicians to perform with the orchestra following auditions with the conductor. All Sinfonia musicians belong to Local 30-73 of the American Federation of Musicians, the Twin Cities union for musical entertainers. The Sinfonia musicians are governed by local union rules and a code of conduct governing how musicians are to conduct themselves during rehearsals, concerts and in the event a musician misses a scheduled concert. (See Id. at 4.)

Generally, the Sinfonia musicians are supplied a list of performance dates and venues from which they select the performances best fitting their schedules. All of the performers, including the Conductor are paid according to union list prices and on a "per set" basis. This payment is documented on tax form 1099, provided by the Sinfonia at the end of the year. The Sinfonia does not provide a pension plan, health insurance, life insurance, or any other benefits for the musicians. In fact, Sinfonia musicians provide their own instruments occasionally provide a music stand and none of the musicians are precluded from participating with other groups or performing independently. Ms. Hanson has moved for a partial summary judgment with respect to her employment status with the Sinfonia.

II. CONCLUSIONS OF LAW

A. Standard of Review

1. Plaintiffs Motion for Partial Summary Judgment [29]

The Supreme Court has held that summary judgment is to be used as a tool to isolate and dispose of claims or defenses that are either factually unsupported or based on undisputed facts. See Celotex Corp. v. Catrett, 477 U.S. 317,323-24 (1986); Hegg v. U.S. 817 F.2d 1328, 1331 (8th Cir. 1987); Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 919 (8th Cir. 2000). Federal Rule of Civil Procedure 56(c) provides, in relevant part, that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986) (holding that the

Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law"). When considering a motion for summary judgment, a court should construe all evidence in favor of the non-moving party. See Anderson, 477 U.S. at 255. However, if the evidence submitted by the non-moving party is merely colorable or is not significantly probative, summary judgment may be granted. Id. at 249-50.

The party opposing summary judgment may not rest upon the allegations set forth in its pleadings, but must produce significant probative evidence demonstrating a genuine issue for trial. Id. at 248-49. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Id. at 247-48. If the opposing party fails to carry that burden, summary judgment should be granted. See Celotex, 477 U.S. at 322. Summary Judgment should "[s]eldom be granted in discrimination cases." Bassett v. City of Minneapolis, 211 F.3d 1097,1099 (8th Cir. 2000).

B. Legal Analysis

1. Musicians of the Minnesota Sinfonia are Independent Contractors

In order for Ms. Hanson to bring a claim against the Sinfonia under the ADA and the MHRA she must be considered an employee. The Sinfonia argues that its musicians are independent contractors and that the local union also considers its musicians independent contractors. Ms. Hanson on the other hand contends she is a Sinfonia employee covered by the ADA and the

MHRA. The American with Disabilities Act and the Minnesota Human Rights Act do not apply to non-employees, therefore independent contractors are excluded from its coverage. See Minn. Stat. § 363.01(16); Birchem v. Knights of Columbus, 116 F. 3d 310,312 (8th Cir. 1997); Farrington v. City of Richfield, 488 N.W. 2d 13 (Minn, Ct App. 1992). Courts evaluating ADA claims have applied the parallel definition of "employee" from Title VII claims. See Castellano v City of New York, 142 F.3d 58,69 (2d. Cir. 1998). Title VII defines "employee" as "an individual employed by an employer." 42 U.S.C. §§ 2000e(f) (Supp. III). Given the absence of any helpful legislative guidance on the breadth of this circular definition, courts have developed tests to distinguish between employees and independent contractors. See Spirides v. Reinhardt, 613 F.2d 826, 829-30 (D.C. Cit. 1979). Determining whether an individual is an employee or independent contractor is a question of law, that must be decided by the court after reviewing the particular facts of each case. See Berger Transfer & Storage v. Central States, Southeast and Southwest Areas Pensions Fund, 85 F, 3d 1374, 1377 (8th Cir. 1996). The Supreme Court has directed that the common-law of agency be used to establish whether a hired person is actually an employee. See Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 323-24 (1992); see also Schweiger v. Farm Bureau Ins. Co., 207 F. 3d 480, 483 (8th Cir. 2000). The Supreme Court in Darden summarized the common-law test as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skills required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship

between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 106.

The applicable test that is overwhelmingly used in Minnesota is described as a hybrid of the common-law test and the economic realities test. See Wilde v. County of Kandivohi, 15 F.3d 103, 105 (8th Cir.1994) (citations omitted). Under this test, the economic realities of the situation and totality of the circumstances surrounding the working relationship are taken into account. Id.

In addition, the economic realities test extends the "agency test" to include, (1) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (2) whether the worker accumulates retirement benefits; (3) whether the "employer" pays social security taxes; and (4) whether the worker accrues yearly leave. Wilde, 15 F.3d 103 at 104. Factors used in both tests are nonexhaustive and consideration of the additional economic factors does not broaden the traditional common-law test. Id. Those factors that are equally irrelevant or of indeterminate weight and thus do not favor either party over the other, should be disregarded in light of the particular facts that apply in each case. See Eisenburg v. Advanced Relocation & Storage, 237 F.3d 111, 114 (2d Cir. 2000).

Applying the relevant factors, this Court concludes that Ms. Hanson is an independent contractor and not an employee of the Sinfonia.

a. Hiring party's right to control the manner of and means by which the produce is accomplished. The U.S. Supreme Court has held that "the extent of control the hiring party exercises over the details of the product is not dispositive." See Community for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989) (finding the control element was not established even though enough control to ensure the end result was met); see also, Hilton Int'l Co., v. NLRB, 690 F.2d 318, 320 (2d Cir.1982) (finding that bandleaders and teachers were still independent contractors though the hotel controlled the working hours including overtime, locations, types of music, when music would be played, volume the music could be played and the number of members in the band). Our Court of Appeals has held that the existence of rules and regulations governing conduct are not definitive in determining the relationship between employee and independent contractor because of the necessity for this type of control to establish the functionality of the organization. See Graves v. Woman's Prof'l Rodeo Ass'n, 907 F.2d 71, 72-74 (8th Cir. 1990).

The product that the Sinfonia sought to accomplish is a professional orchestra performance and in reaching the desired end, this Court believes that Sinfonia exercised little control over the musicians. Specifically, Sinfonia did not control the musicians preparation until the limited rehearsals before performances, and does not control who is involved in the performances because each musician can elect the concerts to play in and may find substitutes for themselves should they change their minds after committing to the performance. Further,

musicians are not precluded from playing with other groups or individually, which is generally forbidden in an employer/employee relationship of this type. Finally, unlike an employee that receives assignments, direction, and orders pertaining to the product on a daily basis, each individual musician controls how the end result will be met by becoming proficient with personal practice. Given the foregoing, this Court concludes that Sinfonia had little control over the means by which the product is accomplished.

b. Skills required. The U.S. Supreme Court has used the skill of an occupation to further assist in the delineation of independent contractor or employee status. See Reid, 490 U.S. at 752. Professional musicians require a high degree of technical proficiency. They audition to exhibit to others the skill level they have achieved at their own expense prior to being hired. Schweiger v. Farm Bureau Ins. Co., 207 F.3d 480,485 (8th Cir. 2000). They do not receive "on the job" training to become musicians. As noted earlier, the Sinfonia musicians do not receive individual instruction on how much or how little practice it will take to accomplish the desired level of proficiency. No daily report or log is required to justify time used nor are the individuals compensated for personal practice time. Accordingly, the skill needed is provided by the Sinfonia musicians themselves without training by the Sinfonia. This court concludes that this type of skill is indicative of an independent contractor.

c. Source of the instrumentalities and tools. An individual is considered an independent contractor where the individual is required to provide a majority of the tools necessary to perform his or her duties. Id. In the instant case, although Sinfonia provides the musical, scores, rehearsal facilities, music stands and concert

schedules, it does not provide the musical instruments, maintenance, insurance, or the attire for the musicians. The individual musicians' investment far exceeds the hiring entity's. See Florida Gulf Coast Symphony, Inc. v. Dept. of Labor & Employment Sec., 386 So. 2d 259, 261 (Fla. Dist. Ct. App 1990). Because the source of the instrumentalities and tools is provided by the musicians they are more like independent contractors.

d. Location of the work. Personal practices take place at the location of the musicians choice and the Sinfonia does not supervise these practices. Rehearsals and concert locations are only selected by the Sinfonia staff as a part of their regular business obligations to produce the required end result. Therefore, this element cannot be factored as the amount of time devoted in either area of "work" is indefinite and cannot be attributed to either employee or independent contractor.

e. Duration of the relationship between the parties, and extent of the hired party's discretion over when and how long to work. Under this factor the Court observes that the musicians do not commit to a particular number of seasons or a minimum number of concerts with the Sinfonia; however once a musician selects to perform in a particular concert he or she is responsible for performing or finding a substitute. If a more fruitful opportunity presented itself, the musician could leave at will and never perform with the Sinfonia again. Further, as noted earlier, each musician retains complete discretion about practices and maintenance of instruments. Therefore, this Court concludes that the at will relationship lends itself more to the independent contractor status,

f. Whether the hiring party has the right to assign additional projects to the hired party. In the instant case,

the Sinfonia did not retain the right to assign additional projects because once the individual musician selects the concert he or she wants to perform new music is assigned, the practices to perfect that music are in the hands of the musician. The musicians are not required to write new parts or scores or to learn different instruments parts. Therefore, this Court concludes the lack of ability to assign additional projects supports the status of an independent contractor.

g. Method of payment. Payment by the project suggests the performer is an independent contractor. Reid, 490 U.S. at 753. Here, Sinfonia musicians arc paid wages using the union set scale on the "per set" basis. If the individual musician elects to participate he or she is compensated for that specific performance or for the series performances that must be done as a group. Sinfonia musicians are paid per project like independent contractors.

h. Hired party's role in hiring and paying assistants. This factor does not lend itself to the particulare of this case, because the nature of the work is such that it simply does not contemplate the use of assistants.

i. Whether the work is part of the regular business of the hiring party. In evaluating this factor the Court observes that it is understood that the work musicians perform is pats of the Sinfonia's regular business as the provider of orchestra music. However, much like a temporary agency worker that steps into the clients facility to provide the exact work the clients regular business requires, the hired agency person is not considered an employee of the client that is paying their salary. Similarly, this Court finds this factor is indicative of an independent contractor.

j. Provisions of employee benefits. The hiring party not providing any employment benefits, or contributing to unemployment insurance or workers' compensation funds is also evidence that an independent contractor relationship. Reid 490 U.S. at 753. Here, the Sinfonia does not provide any employee benefits such as health or life insurance, nor does it contribute to workers' compensation funds for the musicians. Although the Sinfonia paid the musicians union pension benefits for its musicians, Defendant Fishman contends that as a union member himself, it was necessary to keep the Sinfonia in good standing with the local union and the musicians by donating funds into the union pension fund for its musicians. Otherwise, the Sinfonia would find it difficult to work with union musicians and facilities. Accordingly, this Court concludes that the lack of employee benefits contributes to the independent contractor status.

k. Tax treatment of the hired party. That the Sinfonia reports payments to musicians for tax purposes on a form 1099 rather then a W-2, strongly weighs in faver of finding that Hanson was an independent contractor.

1. How work relationship was terminated. In this case, Ms. Hanson did not perform while recovering from injuries she sustained at a Sinfonia rehearsal. Both sides retained the ability to terminate the relationship at any time without cause. It is clear that upon plaintiff's return Fishman terminated her services. Therefore, this factor leads to the independent contractor status.

m. Does worker accrue annual leave. The Sinfonia does not distribute annual leave or sick leave. Consequently, this factor weighs in favor of determining that Ms. Hanson is an independent contractor.

n. Social Security taxes paid. The Sinfonia never paid into the social security fund for any of its musicians. Accordingly, this factor contributes to the independent contractor status. Based on the foregoing and viewing the evidence in the light most favorable to the nonmoving party, this Court concludes that the musicians of the Minnesota Sinfonia are independent contractors, and Ms. Hanson is an independent contractor. The record reveals that although the Sinfonia exercised some control over Ms. Hanson with respect to scheduled concerts and rehearsals, she maintained a tremendous amount of freedom in electing which concerts to perform, whether to practice, how long to practice, and what level proficiency she chose to attain. She was paid per performance, she earned no benefits or vacation, and her compensation was all reported on Forms 1099 instead of W-2 Forms. As an independent contractor, Ms. Hanson cannot maintain a claim of discrimination under the ADA or MHRA. Summary judgment must be granted for the defendant. As only plaintiff's federal claims must be dismissed, the court concludes that plaintiff's state claims should be dismissed without prejudice. Plaintiff can bring these claims in State Court.

III. RECOMMENDATION

Based upon all the files, records and proceedings herein, IT IS HEREBY RECOMMENDED that:

1. Plaintiff's Motion fur Partial Summary Judgment [#29] be DENIED.

2. Defendant's Motion for Summary Judgment [#35] be GRANTED.

DATED: Nov. 21, 2001

FRANKLIN L. NOEL
Chief Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court and serving on all parties, within ten days of service of this Report and Recommendation, written objections which specifically identify the portions of the proposed findings, recommendations or report to which objection is being made, and a brief in support thereof. A party may respond to the objecting party's brief within ten days after service of the objections. All briefs filed under this rule shall be limited to ten pages. A judge shall make a de novo determination of those portions to which objection is made.

This Report and Recommendation does not constitute an order or judgment of the District Court, and it is therefore not appealable to the Circuit Court of Appeals.

00-CV-1900 (JMR/FLN)

UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA

Shelley Hanson

v.

Friends of Minnesota Sinfonia and Jay Fishman

ORDER

January 11, 2002 Filed

Plaintiff objects to the Report and Recommendation, issued November 21, 2001, by the Honorable Franklin L. Noel, United States Chief Magistrate Judge. Plaintiff's objections to the Report were timely filed, pursuant to Local Rule 72.1(c)(2).

Based upon a de novo review of the record herein, the Court adopts the Magistrate's Report and Recommendation. Accordingly, IT IS ORDERED that:

1. Plaintiff's motion for partial summary judgment is denied. [Docket No. 29.]

2. Defendants' motion for summary judgment is granted. [Docket No. 35.)

3. Plaintiff's remaining state law claims are dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 10th, 2002

JAMES M. ROSENBAUM
United States Chief District Judge

Civil No. 00-1494 DDA/FLN

UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA

TRICIA LEROHL a/k/a PATRICIA LEROHL
Plaintiff,

Vs.

FRIENDS OF MINNESOTA SINFONIA d/b/a MINNESOTA SINFONIA; and JAY FISHMAN, an individual and an employer,
Defendants.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

January 24, 2002

Jill Clark, P.A., by JILL CLARK, Golden Valley, Minnesota, appeared on behalf of Plaintiff.

Bassford, Lockhart, Truesdell & Briggs, P.A., by FREDERICK E. FINCH, Minneapolis, Minnesota, appeared on behalf of Defendants.

The threshold question in this case is whether Plaintiff Tricia Lerohl ("Lerohl") was an employee of Defendants Friends of Minnesota Sinfonia ("the Sinfonia") and Jay Fishman ("Fishman") for purposes of federal employment discrimination law. Both parties have moved for summary judgment on that issue, and the Defendants also have moved for summary judgment on all of Lerohl's state and federal claims. Because the Court holds that Lerohl was not an employee of the

Sinfonia and Fishman, the Court will deny Lerohl's motion and will grant the motion of the Defendants in part. The Court will remand Lerohl's remaining Minnesota state law claims to state Court.

The Sinfonia is a chamber orchestra that operates as a non-profit Minnesota corporation. Each year, the Sinfonia presents a numbor of concerts in the Minneapolis are. The Sinfonia maintains a list of "first call" or "regular" musicians to which it offers the opportunity to play for the Sinfonia for pay, Fishman, as artistic director for the Sinfonia, has the discretion to add or remove individual musicians from the "first call" list for any reason. The "first call" musicians generally receive advance notice of the Sinfonia's rehearsal and performance schedule and may elect to play at all or some of the Sinfonia's scheduled performances. "First call" musicians remain free to work on their own projects or to accept employment with third parties while maintaining their relationship with the Sinfonia. If one of the "first call" musicians decides not to play or cancels a commitment for a particular concert or series of concerts, the Sinfonia selects a substitute musician. Musicians working for the Sinfonia provide their own instruments and practice on their own outside of scheduled rehearsals. The Sinfonia has ultimate control over the selection and arrangement of the music for its performances, and the Sinfonia expects musicians working for it to abide by its rules of conduct. The Sinfonia pays musicians working for it on a "per set" basis, issuing checks each week based on the number of group rehearsals and performances each musician has attended. The Sinfonia provides no employee benefits to musicians working for it, although the Sinfonia as a union shop has agreed to pay union scale wages and to make contributions to the local musicians' union's pension plan based on those wages. The Sinfonia treats

musicians working for it as independent contractors for tax purposes.

Lerohl is a professional french horn player. Lerohl performed with the Sinfonia from 1990 to 1999, and for at least some of that time Lerohl was on the Sinfonia's "first call" list. The Sinfonia ceased offering employment to Lerohl in 1999 following a dispute between Lerohl and Fishman. Lerohl commenced suit against the Sinfonia and Fishman in Minnesota state court in April 2000, alleging sexual discrimination and sexual harassment claims under federal and state law. The Defendants timely removed the matter to federal court, and Lerohl since has amended her Complaint to include other state law claims against both Defendants.

Title VII of the Civil Rights Act of 1964, upon which Lerohl bases her federal claims, protects employees and does not extend to independent contractors. Sehweiger v Farm Bureau Ins Co. of Neb., 207 F.3d 484, 483 (8th Cir. 2000). Whether an individual is an employee or an independent contractor is a question of law determined through application of the test articulated in Nationwide Mut. Ins. Co. v. Darden, 303 U.S. 318 (1992). Schweiger, 207 F.3d at 483. Chief.ludge Rosenbaum of this District recently adopted Chief Magistrate Judge Noel's application of the Darden test to facts identical to those in this case and held that musicians working for the Sinfonia were independent contractors. Hanson v. Friends of Minnesota Sinfonia, Civil No. 00-1900 JMR/FLN (D. Minn. Jan. 10, 2002). Although Lerohl's employment status with the Sinfonia presents a close question, this case is indistinguishable from Hanson, and the Court agrees with the analysis and the conclusions of Judge Noel and Judge Rosenbaum in that case. Summary judgment in the Defendants' favor on Lerohl's federal claims accordingly is appropriate.

The Sinfonia and Fishman have moved for summary judgment on Lerohl's state law claims as well. Given that no basis for federal jurisdiction exists after the dismissal of Lerohl's Title VII claims, however, the Court will exercise its discretion to remand the state law issues to state court pursuant to 28 U.S.C. § 1441(c).

For the foregoing reasons, the Court hereby ORDERS that:

1. Plaintiffs Motion for Partial Summary Judgment is DENIED;

2. Defendants' Motion for Summary Judgment is GRANTED in part. Lerohl's claims under Title VII (Complaint Count I) are DISMISSED with prejudice;

3. Defendants' Motion for Summary Judgment is DENIED with respect to Lerohl's remaining state law claims;

4. Lerohl's remaining state law claims are REMANDED to the Hennepin County District Court of the State of Minnesota. This remand shall be stayed for forty days from the date of this Order. The Clerk is instructed not to remand the file during that stay or during any period in which an appeal from this case is pending before the Eighth Circuit Court of Appeals.

Dated: January 24, 2002

DONALD D. ALSOP,
Senior Judge United States District Court

Supreme Court, U.S.
FILED
SEP 22 2003
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(2)

No. 03-292

In the Supreme Court of the United States

TRICIA LEROHL, SHELLEY HANSON,
Petitioners,

v.

FRIENDS OF MINNESOTA SINFONIA,
JAY FISHMAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does this Court's holding in *Clackamas Gastroenterology Associates, P.C. v. Wells*, __ U.S. ___ 123 S.Ct. 1673, 155 L.Ed.2d (2003) that the common law factor of "control" is the principal guidepost in determining whether shareholder-directors in a professional corporation are employees for the purpose of satisfying the 15-employee requirement of the 42 U.S.C. § 12111(5)(A), require the reconsideration of a decision in which the Eighth Circuit held that petitioners were independent contractors and not employees based upon the holding in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)?

CORPORATE DISCLOSURE STATEMENT OF RESPONDENT FRIENDS OF THE MINNESOTA SINFONIA

Friends of the Minnesota Sinfonia is a Minnesota not for profit corporation. It is not publicly traded and no publicly-held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

Although petitioners Tricia Lerohl and Shelley Hanson describe most of the facts and proceedings below essentially accurately, it is necessary, pursuant to Supreme Court Rule 15, to correct their misstatement that Respondent Jay Fishman did not oppose Hanson's motion for partial summary judgment against him. Indeed, Fishman vigorously opposed her motion, and in fact moved for partial summary judgment on her ADA claims on the grounds that Hanson was an independent contractor.

ARGUMENT

CLACKAMAS ESTABLISHED A STANDARD TO DETERMINE WHETHER AN INDIVIDUAL IS AN EMPLOYEE OR AN EMPLOYER BUT DID NOT CHANGE THE STANDARD TO DETERMINE WHETHER A HIRED PARTY IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR.

The petitioners ask this Court to grant the petition for a writ of certiorari, vacate the opinion of the Eighth Circuit below, and remand for reconsideration based upon *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 123 S.Ct. 1673, 155 L.Ed. 2d 615 (2003). The fatal flaw in their argument is that *Clackamas* does not involve the issue raised in this case. The trial courts and the court of appeals held that petitioners are independent contractors, not employees. *Clackamas* addressed the distinct question of whether company owners actively involved in the operations of their business are employees or employers. *Clackamas*, 123 S.Ct. at 1698 n.5. As *Clackamas* has no bearing on the issue here, it cannot justify grant of certiorari, vacatur and remand ["GVR"].

Petitioners' entire argument is an attempt to apply an inapplicable legal rule to obtain reversal of the summary judgment dismissing their claims. The district courts granted summary judgment on the basis that, under this Court's decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), petitioners were independent contractors, rather than employees, and as such did not have standing to sue under the ADA or Title VII. The Eighth Circuit affirmed, and subsequently denied their petition for rehearing or rehearing en banc.

After Hanson and Lerohl filed their petition for rehearing below, but before the Eighth Circuit acted upon it, this Court decided *Clackamas*. Hanson and Lerohl called the *Clackamas* decision to the attention of the court of appeals under Rule 28(j) Federal Rules of Appellate Procedure while their petition was pending.

Clackamas addressed the question of whether four physician-shareholders in a professional corporation could be counted as employees for the purpose of determining whether the corporation was an "employer" as defined in 42 U.S.C. §12111(5)(A). The statute defines the term "employer" to mean an enterprise which has 15 or more employees at applicable times. Recognizing the burdens of "mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail," Congress exempted firms with fewer than 15 employees from the coverage of the ADA and Title VII. *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 940 (7th Cir. 1999), *cert. denied*, 528 U.S. 1019, 120 S.Ct. 526, 145 L.Ed.2d 408 (1999).

In *Clackamas*, Deborah Wells, a bookkeeper employed by Clackamas Gastroenterology Associates, P.C., sued, alleging violations of the ADA. The defendants moved

for summary judgment, arguing that the firm did not meet the ADA's 15-employee requirement because the four physician-shareholders were not "employees" and without them there were only 14 employees. Relying on an "economic realities" test articulated by the Seventh Circuit, the district court granted the motion. The Ninth Circuit reversed, citing the Second Circuit's rejection of the economic realities test, and held that the physicians' use of a corporate structure precluded any analysis to determine whether they were, instead, a partnership. *Clackamas*, 123 S.Ct. at 1676.

This Court granted certiorari to resolve the conflict among the circuits. Rejecting the approaches taken by both the district court and the Ninth Circuit, this Court instead looked to the common law for guidance, as it had in other cases that turned on the definition of the term "employee." *Clackamas* at 1678 (citing *Darden*, 503 U.S. at 322, 112 S.Ct. 1344, 117 L.Ed.2d 581).

Citing the factors described in *Darden* for the common-law test for determining whether a hired party is an employee, the Court recognized that "[t]hese particular factors are not directly applicable to this case because we are not faced with drawing a line between independent contractors and employees. Rather, our inquiry is whether a shareholder-director is an employee or, alternatively, the kind of person that the common law would consider an employer." *Clackamas* at 1678 n.5.

To answer the distinct issue raised in *Clackamas*, the Court looked to the common law's description of the master-servant relationship, and held that "the common-law element of control is the principal guidepost that should be followed in this case." *Clackamas* at 1679. The Court acknowledged that guidelines promulgated by the EEOC also used this approach to address this issue.

According to the Court, the guidelines address "the broad question of who is an 'employee,'" as well as "the narrower question of when partners, officers, members of boards of directors, and major shareholders qualify as employees." *Clackamas* at 1679. To answer the "broad question," the EEOC lists 16 factors from *Darden* relevant to "whether the employer controls the means and manner of the worker's work performance."[1] *Id.* To answer the "narrow question,"-- framed by the EEOC as "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control" -- the EEOC looks to six *different* factors. *Id.* at 1680.[2]

---

[1] *Darden* described the factors used in the common law test for employment status as:
"the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." *Darden*, 503 U.S. at 323-324, 112 S.Ct. 1344.

[2] *Clackamas* described these factors as:
"Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
"Whether and, if so, to what extent the organization supervises the individual's work
"Whether the individual reports to someone higher in the organization
"Whether and, if so, to what extent the individual is able to influence the organization
"Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
"Whether the individual shares in the profits, losses, and liabilities of the organization."
Clackamas, 123 S.Ct at 1680 (citing EEOC Compliance Manual § 605:0009.

Thus, the *Clackamas* Court established a test to determine whether the individual is an *employee or employer* which is *different from* the test used to determine whether an individual is an *employee or independent contractor*. And it re-affirmed that the *Darden* test does not emphasize any particular factor. *Id.* at 1681 ("as was true in applying common law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'") (quoting *Darden*, 503 U.S. at 324, 112 S.Ct. at 1344). Petitioners' argument that *Clackamas* changes the analysis used to determine independent contractor or employee status is wholly without merit.

Although GVR can be an effective tool where "recent events have cast substantial doubt on the correctness of" a lower court's opinion, there are no such "recent events" here. *Lawrence v. Chater*, 515 U.S. 163, 170, 116 S.Ct. 604, 608, 133 L.Ed.2d 545 (1996). Rather than changing the independent-contractor-versus-employee test applied by the Eighth Circuit below, *Clackamas* establishes a test to resolve the employer-versus-employee issue. Granting certiorari, vacating the Eighth Circuit's opinion, and remanding for reconsideration in light of *Clackamas* would therefore be a pointless exercise. Accordingly, respondents Jay Fishman and Friends of Minnesota Sinfonia respectfully ask that the Court deny the petition.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Dated: September 19, 2003.

Respectfully submitted,

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